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February 14, 2005

This Opinion is Not Citable as Precedent of the TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Makiki Electronics
v.
Douglas Mervyn Gray and David William Holloway

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Cancellation No. 92041178

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On Request for Reconsideration

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Edward A. Sokolski, Esq. for Makiki Electronics.

Douglas Mervyn Gray and David William Holloway, pro se.

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Before Chapman, Bottorff and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

On December 22, 2004, we denied the petition for cancellation of respondents' Registration No. 2562987, essentially because petitioner failed to carry its burden of proof.

In the request for reconsideration, petitioner urges that we erred in excluding a deposition on written questions that was not taken in accordance with applicable Trademark Rules. In support of its contention that we erred,

petitioner asserts that the Federal Rules of Civil Procedure apply in Board cases, points to Rule 32(d) of the Federal Rules of Civil Procedure and asserts that respondents failed to interpose a proper objection to the notice stating that the deposition would be taken, thereby waiving any right to object.

Petitioner fails to note the specific wording of Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a), which states that "Except where otherwise provided, and wherever applicable and appropriate, procedure and practice in inter partes proceedings shall be governed by the Federal Rules of Civil Procedure." It should be clear from this provision that the Trademark Rules govern in the first instance, i.e., the Federal Rules apply "except where otherwise provided" by the Trademark Rules, and even then, only when the Federal Rules are "applicable and appropriate."

The Trademark Rules include very detailed provisions governing the taking of depositions on written questions, and differentiate the taking of such a deposition for testimony purposes from the taking of one for discovery purposes. Compare, for example, Trademark Rules 2.124(b)(1) and 2.124(b)(2), 37 C.F.R. §§ 2.124(b)(1) and 2.124(b)(2). In short, Trademark Rule 2.124 governs the taking of a testimonial deposition on written questions in a Board

proceeding and petitioner's invocation of Fed. R. Civ. P. 32(d) is misplaced.[1]

We also note that Fed. R. Civ. P. 32 governs use of discovery depositions in certain particular situations. Petitioner's deposition on written questions was of its own witness, noticed as a testimony deposition. At trial, petitioner was not seeking to rely on a discovery deposition of an adverse party or a non-party witness under any of the circumstances set forth in Fed. R. Civ. P. 32(a).

Finally, the Board has made it very clear that evidence not properly introduced will not be considered. See authorities discussed in TBMP Section 706 (2d ed. rev. 2004).

The request for reconsideration is denied.

[1] Also misplaced is petitioner's reliance on the decision of Brown Badgett, Inc. v. Jennings, 842 F.2d 899 (6th Cir. 1988). That decision involved interpretation of an entirely different provision of the Code of Federal Regulations, and involved a very different set of facts.